No. 90-18

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

ROBERT D. GILMER,

Petitioner,

v.

INTERSTATE/JOHNSON LANE CORPORATION,

Respondent.

On Writ of Certiorari To the United States Court of Appeals for the Fourth Circuit

BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER

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QUESTION PRESENTED

Whether an employee who signs a pre-employment contract with his employer to arbitrate any claims between the parties bargains away his right to have his federal statutory claims of discrimination adjudicated in the courts?

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INTEREST OF AMICUS CURIAE

The Lawyers' Committee for Civil Rights Under Law submits this brief as *amicus curiae* urging reversal of the decision by the Court of Appeals for the Fourth Circuit in *Gilmer v. Interstate/Johnson Lane Corporation*, 895 F.2d 195 (4th Cir. 1990).[1]

The Lawyers' Committee is a nonprofit organization established in 1963 at the request of the President of the United States to involve leading members of the bar throughout the country in the national effort to insure civil rights to all Americans. It has represented and assisted other lawyers in representing numerous plaintiffs in administrative proceedings and lawsuits under Title VII. *E.g., Lewis v. Bloomsburg Mills, Inc.*, 773 F.2d 561 (4th Cir. 1985); *Payne v. Travenol Laboratories, Inc.*, 673 F.2d 798 (5th Cir.), *cert. denied*, 459 U.S. 1038 (1982); *Sledge v. J.P. Stevens & Co.*, 585 F.2d 625 (4th Cir. 1978), *cert. denied*, 440 U.S. 981 (1979). The Lawyers' Committee has also represented parties and participated as an *amicus* in Title VII cases before this Court. *E.g., Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642 (1989); *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988); *Connecticut v. Teal*, 457 U.S. 440 (1982); *Hazelwood School District v. United States*, 433 U.S. 299 (1977).

The question presented by this case raises important and recurring issues in all civil rights cases. Whether claims brought pursuant to the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (1990). ("ADEA") are subject to compulsory arbitration is an issue that potentially affects every case of employment discrimination brought under a

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[1] Pursuant to Rule 37.3, written consents of the parties to the submission of this brief as *amicus curiae* are on file with the Clerk of the Supreme Court.

federal employment discrimination statute which provides for resolution of claims through the courts, and particularly Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. §§ 2000e to -17 (1990), the principal focus of the Lawyers' Committee's activities.

This Court's decision will undoubtedly have far reaching and important implications for present and future employment discrimination cases in which the Lawyers' Committee participates. Moreover, the Lawyers' Committee has a long-standing interest in persuading the Court to adopt principles that will result in the sound administration of the discrimination laws, so that findings of liability will be obtainable by persons with legitimate claims and limited resources. Finally, the Lawyers' Committee also brings the Court the benefit of its actual experience in litigating numerous employment discrimination cases, and is therefore in a position to discuss the relative advantages and disadvantages of resolution of such cases through arbitration as opposed to the court system.

SUMMARY OF ARGUMENT

In *Gilmer*, the Fourth Circuit Court of Appeals held that this Court's decisions in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, (1987); and *Rodriguez De Quijas v. Shearson/American Express, Inc.*,490 U.S. 477, 109 S.Ct. 1917, 104 L.Ed. 2d 526 (1989) endorsing arbitration as a means to resolve commercial disputes had *sub silentio* overruled this Court's well-established pronouncements that arbitration cannot be a compulsory remedy in employment rights cases. *E.g., Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974) (Title VII); *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S.

728 (1981), *cert. denied*, 471 U.S. 1054 (1985) (Fair Labor Standards Act); *McDonald v. City of West Branch*, 466 U.S. 284 (1984) (28 U.S.C. § 1983).

The Fourth Circuit's ruling is wrong and should be reversed by this Court.[2] *First*, the Fourth Circuit failed to recognize, contrary to this Court's express holdings in *Gardner-Denver*, *Barrentine* and *McDonald*, that employment rights cases *are* different from commercial disputes. There are public interests at issue in civil rights cases that mandate public resolution in the courts, with the full panoply of procedural rights and remedies available there that arbitration simply does not provide. In short, *Gardner-Denver* and its progeny are still good law and the Fourth Circuit erred by assuming they had been silently overruled by *Mitsubishi*, *McMahon* and *Rodriguez*.

Second, the Fourth Circuit's ruling ignores the fact that, as this Court explained in *Gardner-Denver*, however well-suited arbitration might be for the resolution of private commercial disputes, arbitration is not an appropriate forum for adjudicating civil rights violations.

Third, the Fourth Circuit's holding ignores the fundamental inequality in bargaining between employers and employees. It cannot fairly be assumed that prospective waivers by individual employees of court remedies in favor of arbitration are knowing or voluntary.

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[2] Indeed, it is worth noting that every Circuit that has considered the issue has ruled exactly opposite to *Gilmer* and refused to order compulsory arbitration in employment rights cases. *E.g., Alford v. Dean Witter Reynolds*, 905 F.2d 104 (5th Cir. 1990) (Title VII); *Utley v. Goldman Sachs & Co.*, 883 F.2d 184 (1st Cir. 1989), *cert. denied*, U.S. , 110 S. Ct. 842 (1990) (Title VII); *Nicholson v. CPC International, Inc.*, 877 F.2d 221 (3d Cir. 1989) (ADEA); *Swenson v. Management Recruiters International, Inc.*, 858 F.2d 1304 (8th Cir. 1988), *cert. denied*, U.S. , 110 S. Ct. 143 (1989) (Title VII); *Johnson v. University of Wisconsin - Milwaukee*, 783 F.2d 59 (7th Cir. 1986) (ADEA).

Finally, the Fourth Circuit's approach to statutory interpretation is artificial and stilted. In effect, the Fourth Circuit ruled that, unless Congress had expressly stated that court remedies could not be waived by an agreement to arbitrate, *Mitsubishi* and the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-15 (1990), require the strict enforcement of private contracts to arbitrate. That ruling ignores the FAA's own exclusion of employment disputes from its reach and, even more significantly, Congress' oft-expressed insistence on the necessity for court remedies for civil rights violations as set forth in, among other places, Title VII and its legislative history.

In this *amicus* brief, we focus the foregoing arguments on the Title VII model. This Court has often observed that the substantive provisions of the ADEA are "derived *in haec verba* from Title VII" and that Title VII precedents apply "with equal force" to ADEA claimants. *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985); *Oscar Mayer and Co. v. Evans*, 441 U.S. 750, 756 (1979); *Lorillard v. Pons*, 434 U.S. 575, 584 (1978). Indeed, the similarities between the ADEA and Title VII are substantial. Both statutes seek to eliminate discrimination in the work place, albeit on different bases; both statutes rely upon the conciliation procedures of the Equal Employment Opportunity Commission ("EEOC"); and both statutes provide for civil actions in the courts to remedy and enjoin discriminatory employment practices and procedures. *Compare* 42 U.S.C. § 2000e-2(a)(2) (1990) and 29 U.S.C. § 623(a)(2) (1990); 42 U.S.C. § 2000e-5(f) (1990) and 29 U.S.C. § 626(b) (1990); and 42 U.S.C. § 2000e-5(f) (1990) and 29 U.S.C. § 626(d) (1990). Moreover, the Lawyers' Committee has extensive experience in litigating Title VII cases in the trial and appellate courts. That experience convincingly demonstrates that, contrary to the Fourth Circuit's ruling, employment rights cases—whether brought under ADEA, Title VII or any other civil rights statute—belong in the courts, not compulsory arbitration.

In sum, we respectfully submit that this Court should reaffirm *Gardner-Denver*, *Barrentine* and *McDonald* and reverse the Fourth Circuit's decision in *Gilmer*.

ARGUMENT

I. THE FOURTH CIRCUIT'S DECISION ALLOWING COMPULSORY ARBITRATION OF ADEA CLAIMS DISREGARDS THIS COURT'S HOLDINGS IN *GARDNER-DENVER*, *MCDONALD*, AND *BARRENTINE* AND IS CONTRARY TO THE LEGISLATIVE INTENT OF FEDERAL CIVIL RIGHTS STATUTES.

In *Gilmer*, the Fourth Circuit held that this Court's recent endorsement of private arbitration in commercial cases in *Mitsubishi*, *McMahon* and *Rodriguez* effectively overruled this Court's earlier rejection of compulsory arbitration in the employment rights area in *Gardner-Denver*, *Barrentine* and *McDonald*. *Gilmer*, 895 F.2d at 201-02. The Fourth Circuit further held that, applying the statutory interpretation test espoused by *Mitsubishi*, it could find no evidence in ADEA of a Congressional preference for court remedies over arbitration. The Fourth Circuit also summarily rejected the argument that civil rights cases are different from commercial disputes with respect to the federal court's deference to arbitration. Accordingly, the Fourth Circuit enforced a broadly worded arbitration clause in the employment contract signed by Mr. Gilmer six years before he was allegedly terminated unlawfully due to his age, and sent him to arbitration.[3]

The Fourth Circuit first stated its broad reading of *Mitsubishi* and its progeny:

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[3] This appeal thus addresses the enforceability of *prospective* waivers of judicial remedies. It does not implicate agreements to arbitrate reached *after* the dispute has arisen.

> In a trilogy of recent cases, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 105 S. Ct. 3346, 87 L.Ed. 2d 444 (1985); *Shearson/American Express, Inc v. McMahon*, 482 U.S. 220, 107 S. Ct. 2332, 96 L.Ed. 2d 185 (1987); and *Rodriguez de Quijas v. Shearson/American Express, Inc.*, U.S. 109 S. Ct. 1917, 104 L.Ed. 2d 526 (1989), the Supreme Court has endorsed arbitration as an effective and efficient means of dispute resolution . . . . An arbitration agreement is unenforceable [under *Mitsubishi* and its progeny] only if Congress has evinced an intention to preclude waiver of the judicial forum for a particular statutory right, or if the agreement was procured by fraud or use of excessive economic power.

895 F.2d at 196-97.

The Fourth Circuit next rejected the contention that ADEA's text or legislative history evidenced a preference for a judicial forum:

> We find nothing in the text, legislative history, or underlying purposes of the ADEA indicating a congressional intent to preclude enforcement of arbitration agreements. Arbitration is nowhere mentioned in the text of the statute, and "[t]his silence in the text is matched by silence in the statute's legislative history." . . . Moreover, we see no conflict between arbitration and the underlying purposes of the ADEA which would preclude arbitration of ADEA claims.

895 F.2d at 197 (citations omitted).

The Fourth Circuit also summarily dismissed the continued vitality of *Gardner-Denver* and its line of cases:

> Gilmer points to three cases decided before the Supreme Court's recent trilogy and argues that those cases are controlling here [citing *Gardner-Denver*, *Barrentine* and *McDonald*] . . . . .
>
> We find these cases inapposite. First, none of the three even mention the FAA . . . . .
>
> Second, *Gardner-Denver*, *Barrentine* and *McDonald* all involved arbitration under collective bargaining agreements . . . [C]oncern about the divergent interests of employee and union simply does not exist where, as in Gilmer's case, the individual employee has agreed to arbitration . . . . .
>
> For the foregoing reasons we think it clear that *Gardner-Denver*, *Barrentine*, and *McDonald* do not control our decision here.

895 F.2d at 201-02.

Finally, the Fourth Circuit rejected the notion that there is a distinction between commercial disputes and employment rights cases for purposes of enforcing arbitration agreements:

> We remain sensitive to the fact that the context in which this case arises differs somewhat from the contexts of *Mitsubishi*, *McMahon* and *Rodriguez*. Whereas the statutes in those cases were primarily commercial in focus, the ADEA is a civil rights statute. Moreover, the complainants in those cases were securities customers and persons injured by antitrust violations, not employees who are allegedly victims of discrimination in the workplace. Although the beneficiaries of statutory protections may vary, the principles of statutory interpretation do not.

895 F.2d at 203.

The Fourth Circuit's reasoning, we respectfully submit, is fatally flawed. Civil rights actions, unlike private commercial disputes, involve public interests that require judicial resolution; for that reason alone, *Gardner-Denver* and its progeny remain good law, notwithstanding the *Mitsubishi* trilogy of cases. Moreover, as this Court properly recognized in *Gardner-Denver*, arbitration simply does not provide adequate procedural and substantive protections for civil rights cases. Nor can it be said that individual employees, such as Mr. Gilmer, knowingly and voluntarily waived their right to a judicial forum for their civil rights claims. Finally, the statutory language and legislative history of the FAA and civil rights statutes such as Title VII evidence an unambiguous Congressional preference for judicial remedies.

A. *There are Significant Differences Between Civil Rights and Commercial Disputes That Warrant a Lesser Deference to Arbitration.*

The substantive issue in *Mitsubishi* was a breach of contract and antitrust dispute between an automobile manufacturer and a car dealer. *Mitsubishi*, 473 U.S. at 616-20. Similarly, the underlying substantive issues in both *McMahon*, 482 U.S. at 222 and *Rodriguez*, 490 U.S. 477, 104 L.Ed. 2d 526, 533, were alleged violations of the securities laws. At bottom, each of those cases centered upon a private litigant's claim for money damages.[4]

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[4] Indeed, the *Mitsubishi* Court rejected a claim by the plaintiff that its antitrust claim raised important public policy issues that should not be sent to private arbitration:

> Notwithstanding its important incidental policing function, the treble-damages cause of action conferred on private parties by § 4

(footnote continues)

As this Court has often stated, however, civil rights cases are different. Civil rights cases necessarily implicate issues of public importance that require the public forum of a courtroom and the wide discretion that only a court has to fashion remedies that go beyond the interests of the private litigants in order to eradicate employment discrimination in this country. Civil rights issues should not be addressed in the relative privacy of arbitration before decisionmakers empowered only to resolve the particular private dispute before them. Thus, in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977), this Court noted in the Title VII context that: "The primary purpose of Title VII was 'to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens'." *Id.* at 348-49 (citations omitted).

In *Teamsters*, this Court emphasized the importance of the courts in enforcing Title VII's legislative mandate to eradicate discrimination:

> In *Griggs v. Duke Power Co.*, and again in *Albermarle*, the Court noted that a primary objective of Title VII is prophylactic: to achieve equal employment opportunity and to remove the barriers that have operated to favor white male employees

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(footnote continued)

> of the Clayton Act, 15 U.S.C. § 15 and pursued by Soler here by way of its third counterclaim, seeks primarily to enable an injured competitor to gain compensation for that injury.

Mitsubishi, 473 U.S. at 635.

Similarly, in *McMahon*, this Court rejected the argument that claims brought under the Racketeer Influenced Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962 *et seq.*, involved public policy issues that should not be sent to arbitration, holding that RICO claims are also mere private money damages claims. *McMahon*, 482 U.S. at 240-42.

over other employees . . . . An equally important purpose of the Act is 'to make persons whole for injuries suffered on account of unlawful discrimination.' In determining the specific remedies to be afforded, a district court is 'to fashion such relief as the particular circumstances of a case may require to effect restitution.'

Thus, the Court has held that the purpose of Congress in vesting broad equitable powers in Title VII courts was "to make possible the 'fashion[ing] [of] the most complete relief possible,' and that the district courts have 'not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future.' "

Id. at 364 (citations omitted). *See also Albemarle Paper Co. v. Moody*, 422 U.S. 405, 420-21 (1975) ("Congress' purpose in vesting a variety of 'discretionary' powers in the courts was . . . to make possible the fashion[ing] [of] the most complete relief possible").

In short, in each and every civil rights employment case, there is a public interest present that goes beyond simply making the plaintiff-victim whole and requires the fashioning by a court of a broad remedy designed to prevent any further discrimination. It is the public policy of the United States, as enacted in Title VII, ADEA and other civil rights statutes, to eliminate discrimination from the workplace. That public policy can only be vindicated in the courts; the private remedy of arbitration can never adequately address that public interest. As this Court succinctly stated in *Gardner-Denver:*

The private right of action remains an essential means of obtaining judicial enforcement of Title VII. *In such cases, the private litigant not only redresses his own injury but also vindicates the important congressional policy against discriminatory employment practices.*

Gardner-Denver, 415 U.S. at 45 (citations omitted; emphasis added).

B. *The Courts are Far Better Suited Than Private Arbitrators to Adjudicate Employment Discrimination Claims.*

As this Court expressly held in *McDonald v. City of West Branch*, 466 U.S. 284, 290 (1984)—which, notably, was decided only one year before *Mitsubishi*—"although arbitration is well-suited to resolving contractual disputes . . . it cannot provide an adequate substitute for a judicial proceeding in protecting the federal statutory and constitutional rights that § 1983 [and other civil rights statutes are] designed to safeguard."

First, the federal courts have greater expertise in adjudicating Title VII claims. While arbitrators are experienced in labor contract and other commercial disputes, they are not, as a group, well versed in the complexities of Title VII jurisprudence. Moreover, arbitrators perform a role different from courts in that they are charged with effectuating the intent of the parties under a contract rather than enforcing the requirements of ADEA, Title VII or any other civil rights statute. *See Gardner-Denver*, 415 U.S. at 57. Indeed, where the collective bargaining agreement or other employment contract conflicts with the dictates of ADEA or Title VII, the arbitrator must apply the provisions of the agreement to enforce its terms. As this Court observed in *McDonald*, the arbitrator's expertise "pertains primarily to the law of the shop, not the law of the land." 466 U.S. at 290; *see also Barrentine*, 450 U.S. at 743; *Gardner-Denver*, 415 U.S. at 57. As noted in *Gardner-Denver:*

> Parties usually choose an arbitrator because they trust his knowledge and judgment concerning the demands and norms of industrial relations. On the other hand, the resolution of statutory or constitutional issues is a primary responsibility of courts, and judicial construction has proved especially necessary with respect to Title VII, whose broad language frequently can be given meaning only by reference to public law concepts.

415 U.S. at 57.

Second, unlike judges, a "substantial proportion of . . . arbitrators are not lawyers." *Barrentine*, 450 U.S. at 743 n. 21. These non-lawyer arbitrators cannot be expected to be familiar with the extensive body of law interpreting Title VII. Issues arising under Title VII, ADEA and other civil rights statutes must be resolved in light of volumes of legislative history and decades of legal interpretation. Though an arbitrator may be competent to resolve many preliminary factual questions, he may lack the competence to decide the ultimate legal issue in a civil rights case. *See Barrentine*, 450 U.S. at 743. That lack of competence is unacceptable in cases of such paramount public concern.

In addition, even if competent to resolve the complex legal issues presented by civil rights cases, arbitrators can add nothing to the development of the law in the civil rights area, and may even detract from that development. Arbitration decisions are not often publicly reported and they consequently cannot contribute to either the public knowledge of discrimination law or the ever-growing body of decisions that guide law-abiding employers in their personnel decisions. Further, because arbitrators are not bound by the principles of *stare decisis*, they necessarily will detract from legal certainty in the employment discrimination field. Thus, mandatory submission of Title VII and ADEA claims to arbitration

will frustrate rather than further the "legislative purposes" of federal civil rights statutes, which "require[s] . . . the principled application of standards consistent with those purposes . . . . Important national goals would be frustrated by a regime of discretion than 'produce[d] different results for breaches of duty in situations that cannot be differentiated in policy.' " *Albermarle*, 422 U.S. at 417 (citation omitted).

Third, unlike the courts, arbitrators lack the authority to enforce fully the important individual rights protected by Title VII. An arbitrator's power is both derived from, and limited by, the collective bargaining agreement or other contract. *McDonald*, 466 U.S. at 290; *Barrentine*, 450 U.S. at 744; *Gardner-Denver*, 415 U.S. at 53. Arbitrators lack the broad discretionary power granted to the courts by Title VII and ADEA. In *Gardner-Denver*, this Court recognized the severe limitations on the authority of the arbitrator to stray from the employment agreement to invoke public laws that conflict with the contract between the parties:

> [A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.

415 U.S. at 53 (quoting *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960)); *see also McDonald*, 466 U.S. at 291-92; *Barrentine*, 450 U.S. at 744. Accordingly, if the individual rights guaranteed by ADEA or Title VII conflict with the parties' employment agreement, the arbitrator must enforce the agreement even if

to do so requires a ruling contrary to the public policies underlying Title VII. *McDonald*, 466 U.S. at 291; *Barrentine*, 450 U.S. at 744.

Arbitrators also lack the power that courts have to hold a recalcitrant defendant in contempt, both during and after Title VII or ADEA actions, for willfully refusing to obey court orders. 42 U.S.C. § 2000e-5 (1964).

Fourth, subsequent judicial review of an arbitrator's decision is severely limited. An arbitrator's decision is final and binding on the employer and employee, thereby prohibiting *de novo* review by the courts. *Gardner-Denver*, 415 U.S. at 54. Moreover, arbitrators have no obligation to any reviewing court to give reasons for their decision or award. *See McDonald*, 466 U.S. at 290-91; *Gardner-Denver*, 415 U.S. at 57-58. Accordingly, the role of the appellate courts in developing and articulating the important public policies at issue in Title VII, ADEA and other civil rights cases would be sharply circumscribed, if not almost entirely eliminated, by a rule that allowed employers routinely to insert enforceable arbitration clauses into employment contracts.

Finally, the procedural tools available to Title VII, ADEA and other civil rights claimants in judicial proceedings are not available in arbitration, which is, as a result, an inadequate substitute for judicial factfinding. *McDonald*, 466 U.S. at 291-92; *Barrentine*, 450 U.S. at 738; *Gardner-Denver*, 415 U.S. at 57-58. As the *McDonald* Court observed:

> [A]rbitral factfinding is generally not equivalent to judicial factfinding. As we explained in *Gardner-Denver*, "[t]he record of the arbitration proceedings is not as complete; the usual rules of evidence do not apply; and rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination, and testimony under oath, are often severely limited or unavailable." 415 U.S. at 57-58, 94 S. Ct. 1011, 39 L.Ed. 2d 147.

466 U.S. at 291.

The absence of court procedures in arbitrations limits the remedies available under ADEA, Title VII and other civil rights statutes and promotes inefficiency, if not injustice. For example, the class action device under Rule 23 of the Federal Rules of Civil Procedure provides for the resolution of multiple claims of discrimination in a single action. The class action procedure also permits the court to fashion a class-wide remedy affecting numerous employees nationwide. There is no similar procedure in arbitration. Absent the class action device, many meritorious employment discrimination complaints may well go unremedied, either because (a) none of the individual claims warrants the expense of a contested arbitration proceeding or (b) the lack of any possible attorneys' fee award discourages lawyers from bringing such claims on behalf of discrimination victims.

In sum, as this Court has already recognized, arbitration is not an appropriate forum for the resolution of the critically important public and private interests at stake in employment discrimination cases. *Gardner-Denver* and its progeny were correctly decided; the Fourth Circuit erred in concluding that *Mitsubishi*, *McMahon* and *Rodriguez sub silentio* overruled those decisions; and this Court should reaffirm the continued viability of *Gardner-Denver* and its line of cases.

C. *The Inequality of Bargaining Leverage Between Employers and Employees Justifies Less Deference to the FAA.*

In *Gilmer*, the Fourth Circuit distinguished *Gardner-Denver* and its progeny, in part, on the ground that those cases arose in the context of collective bargaining agreements,

whereas this case arises out of an individual employment contract. 895 F.2d at 201. That distinction misses the point. The individual employment contract situation presents a more, not less, compelling reason to disfavor a claimed waiver of judicial remedies in favor of arbitration.

Unlike the usual presumption in commercial cases, it is virtually always the case in employment rights disputes that the employer has substantially greater bargaining leverage than does the employee. That is, in fact, the fundamental premise of this nation's labor laws. As Congress recognized in enacting the Norris-La Guardia Act, "the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment." 29 U.S.C. § 102 (1973). *See also Barrentine*, 450 U.S. at 735.

Thus, when an employer insists upon a broad arbitration clause in an individual employment contract, the employee ordinarily has little choice but to agree and, in most instances, little knowledge of the statutory rights he is giving up. Contrary to the Fourth Circuit's conclusion, that is all the more reason to be suspicious of arbitration clauses in individual employment contracts and to hold, as this Court did in *Gardner-Denver*, that an employee's right to a judicial forum in civil rights cases is "not susceptible of prospective waiver." 415 U.S. at 51-52.

D. *The Text and Legislative History of the FAA and Title VII Amply Demonstrate a Congressional Preference for a Judicial Remedy.*

Even in commercial cases, the *Mitsubishi* decision recognized that the presumption in favor of arbitration is not irrebuttable:

> That is not to say that all controversies implicating statutory rights are suitable for arbitration.

> There is no reason to distort the process of contract interpretation, however, in order to ferret out the inappropriate. Just as it is the congressional policy manifested in the Federal Arbitration Act that requires courts liberally to construe the scope of arbitration agreements covered by that Act, it is the congressional intention expressed in some other statute on which the courts must rely to identify any category of claims as to which agreements to arbitrate will be held unenforceable.

Mitsubishi, 473 U.S. at 627.

In the employment context, there is ample evidence in the text and legislative history of the FAA and Title VII to lead inescapably to the conclusion that employment discrimination cases should be heard in the courts, rather than in arbitration. For that reason alone, the Fourth Circuit's decision in *Gilmer* should be reversed.

1. *The FAA exempts employment disputes.*

The Fourth Circuit's decision in *Gilmer* was expressly predicated on the "federal policy favoring arbitration" enacted in the Federal Arbitration Act. *Gilmer*, 895 F.2d at 201. Section 1 of the FAA, however, explicitly excludes from the Act all "contracts of employment of seamen, railroad employees, *or any other class of workers engaged in foreign or interstate commerce.*" 9 U.S.C. § 1 (emphasis added).

The unambiguous intent of Section 1 of the FAA is to exempt from the federal policy favoring arbitration employment contracts of workers engaged in interstate commerce.[5]

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[5] The purpose of Section 1 to exclude all employment contracts from the FAA is apparent from the plain language of the statute. That purpose is confirmed by the legislative history of Section 1 which is discussed in detail in the *Amicus* Brief of the American Association of Retired Persons.

Although some courts of appeals long ago held that Section 1 of the FAA applied only to workers in the transportation industry, that conclusion was based upon an incomplete reading of the legislative history and ignored the plain language of Section 1. *See, e.g., Tenney Engineering, Inc. v. United Electrical, Radio and Machine Workers' of America*, 207 F.2d 450 (3d Cir. 1953) (*en banc*). More recently, however, this Court and several lower federal courts have recognized that the employment contract exemption of Section 1 of the FAA is far broader than the transportation industry and in fact covers collective bargaining agreements in all industries engaged in interstate commerce. *See, e.g., United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29 n.9 (1987); *Occidental Chemical Corp. v. Int'l Chemical Workers Union*, 853 F.2d 1310, 1315-16 (6th Cir. 1988); *American Postal Workers Union v. United States Postal Service*, 823 F.2d 466, 469 (11th Cir. 1987); *Derwin v. General Dynamics Corp.*, 719 F.2d 484, 488 n.3 (1st Cir. 1983). Although the issue has not yet arisen in any decision by this Court, it is equally clear that Section 1 of the FAA exempts individual employment contracts. In short, Section 1 of the FAA itself evidences Congress' intent to exempt employment rights disputes from compulsory arbitration.

2. *The legislative history of Title VII evidences a clear preference for judicial remedies.*

In enacting Title VII, the model for ADEA,[6] Congress made plain that its purpose in passing employment rights legislation was not just to adjudicate private wrongs and remedies but also to eradicate discrimination at all levels of employment, nationwide. As the 1964 Report of the House Committee on Education and Labor explained:

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[6] As discussed above, the legislative history and judicial construction of Title VII are directly relevant to the interpretation of ADEA, as this Court has often recognized. *See* p. 4, *supra*.

The committee finds that testimony received regarding the need for this legislation could scarcely be more cogent and convincing. The conclusion inescapably to be drawn from 98 witnesses in 12 days of hearings, held in various sections of the country as well as in Washington, and from many statements filed without oral testimony, is that in all likelihood fully 50 percent of the people of the United States in search of employment suffer some kind of job opportunity discrimination because of their race, religion, color, national origin, ancestry, or age. It should be made clear that the evidence poured in from all parts of the Nation - East, West, North, and South. This act cannot then be viewed as an act intended merely to correct abuses in any one section of the country. *Clear enunciation and implementation of a national policy on equal employment opportunity are obviously long overdue at this point in the history of the United States.*

* * *

In short, this act proposes active steps toward achievement of basic constitutional and moral transforming from the theoretical into the actual the fundamental principles which are the very foundation of American democracy - and undertakes to remove deficiencies and to attain positive benefits necessary to internal well-being and to continued world leadership.

H.R. Rep. No. 1370, 87th Cong., 2d Sess. 1-2, 5(1962), (reprinted in *Legislative History of Titles VII and XI of Civil Rights Act of 1964* at 2155-56, 2159 (emphasis added).

In enacting Title VII, Congress relied upon the availability of federal court actions to achieve its goal of eliminating employment discrimination. As explained by Mr. Justice Powell, writing for the Court in *Gardner-Denver:*

> Congress enacted Title VII . . . to assure equality of employment opportunities by eliminating those practices and devices that discriminate on the basis of race, color, religion, sex, or national origin . . . . Cooperation and voluntary compliance were selected as the preferred means for achieving this goal. To this end, Congress created the Equal Employment Opportunity Commission and established a procedure whereby existing state and local equal employment opportunity agencies, as well as the Commission, would have an opportunity to settle disputes through conference, conciliation, and persuasion before the aggrieved party was permitted to file a lawsuit . . . .
>
> Even in its amended form, however, Title VII does not provide the Commission with direct powers of enforcement. The Commission cannot adjudicate claims or impose administrative sanctions. *Rather, final responsibility for enforcement of Title VII is vested with federal courts.* The Act authorizes courts to issue injunctive relief and to order such affirmative action as may be appropriate to remedy the effects of unlawful employment practices . . . . *Taken together, these provisions make plain that federal courts have been assigned plenary powers to secure compliance with Title VII.*

415 U.S. at 44-45 (citations omitted; emphasis added).

Indeed, the legislative history of the 1972 Equal Employment Opportunities Enforcement Act is replete with references to the particular qualities of federal courts which, in Congress' judgment, made them the best forum for adjudicating civil rights cases. For example, the 1972 House Committee on Education and Labor Report states:

> The problem Title VII seeks to correct is not one susceptible to the kind of policy balancing that is usual in the administration of law regulating utilities or other situations involving competing interests. Racial discrimination does not occupy the status of an "interest" under our system of law. It is a grave injustice which should be eliminated in as quick and efficient a manner as possible.
>
> * * *
>
> *The appropriate forum to resolve civil rights questions, questions of employment discrimination as well as such matters as public accommodations, school desegregation, fair housing, and voting rights, is a court.* Civil rights issues usually arouse strong emotions. United States district court proceedings provide procedural safeguards: Federal judges are well known in their areas and enjoy great respect; the forum is convenient for the litigants and is impartial; the proceedings are public, and the judge has power to resolve the problem and fashion a complete remedy.
>
> * * *
>
> *The district court approach has a great advantage over an administrative hearing procedure in securing the needed evidence.* The Federal Rules of Civil Procedure, with respect to discovery, would greatly facilitate the collection of evidence for trial . . . . Discovery procedures take less time than administrative fact-gathering techniques, and the contempt powers of the court operate to inhibit any intimidation of witnesses, which is a rather difficult problem that is often real, but seldom apparent.

H.R. Rep. No. 92-238, 92d Cong., 1st Sess. 62-63 (1971), (reprinted in *Legislative History of the Equal Employment Opportunity Act of 1972* at 62-63) (1972) (emphasis added) (hereinafter "1972 Act Legis. Hist.").

During Congressional debate of the 1972 amendments to Title VII, Congress' insistence on the availability of a federal court remedy was frequently expressed. Thus, in favoring judicial enforcement over cease and desist power vested in the EEOC, Congressman Erlenborn noted:

> There are those who say that the cease-and-desist approach is much preferable; that the courts cannot do the job of guaranteeing equal opportunity for employment . . . . [I]f the courts are so inefficient and unable to grant relief in this area, why is it that over the past many years great strides have been made in the civil rights field primarily through [the] Federal courts?

1972 Act Legis. Hist. at 248.

Congressman Gerald R. Ford made a similar observation:

> In this kind of situation [Title VII cases], discretion is very, very important. I happen to believe the system of justice in the courts is a better forum for that, rather than leaving it in the hands of an agency which has the right to investigate, to prosecute, to make a decision and then to enforce it. I strongly prefer the use of the courts for enforcement, rather than the agency itself.

1972 Act Legis. Hist. at 263.

Likewise, in the Senate, Senator Dominick, the leading proponent of an amendment requiring federal court enforcement instead of agency cease and desist power, explained his preference for a judicial remedy as follows:

> This approach is superior for several reasons. First it provides a combination of the expertise of the EEOC in investigating, processing, and conciliating unfair employment cases with the expertise and independence of the Federal courts. The equal employment area is one which produces strong emotions among all parties . . . . *I believe that these strong emotions should be tempered by restraint when the adjudication of rights is at issue. The Federal courts are best able to provide the tempering restraint which will allow for a rational resolution of the issues of any given case.*

1972 Act Legis. Hist. at 333.

* * *

> There are many advantages to allowing the courts to decide whether or not a charge [of discrimination] has been substantiated and then let it issue and enforce the cease-and-desist order. *First of all, it is a fact that the courts have done a good job in dealing with civil rights questions, including Title VII questions. This use of the courts would assure an impartial tribunal, thus guaranteeing each side the due process of law.*

1972 Act Legis. Hist. at 682 (emphasis added).

Similarly, Senator Fannin observed that "[t]he district court judges have shown in recent years their capacity to resolve civil rights disputes . . . because of the respect with which the Federal judiciary is viewed, their decisions have greater immediate impact and moral sanctions than would the decision of an executive administrative agency."

1972 Act Legis. Hist. at 699.

In short, Congress' insistence upon the resolution of employment discrimination cases, as evidenced by the legislative history of Title VII, is beyond dispute. To be sure, there is no explicit reference to a preference for a judicial remedy over arbitration in the text of Title VII or ADEA. But that reflects a distinction without a difference. It is facile at best to suggest, as did the Fourth Circuit in *Gilmer*, that a choice of a judicial rather than administrative forum "says nothing about Congress' attitude toward arbitration." 895 F.2d at 199. Each of the reasons expressed by Congress in 1972 for preferring the courts over an EEOC remedy applies just as well to the arbitration alternative: The courts are public while administrative proceedings are private; the courts receive far greater public respect as a general rule than do arbitrators; the Federal Rules of Civil Procedure provide far greater discovery rights than are available in arbitration; and the courts have greater remedial powers, and experience in employing those powers in the employment discrimination field, than do arbitrators.

CONCLUSION

The Fourth Circuit's decision in *Gilmer*, if allowed to stand by this Court, could well sound a death knell for the public, judicial enforcement of anti-employment discrimination laws in this country. If the Fourth Circuit's ruling is not reversed, employers can be expected to include as a matter of course in their employment contracts broad arbitration clauses and to insist upon the arbitration of all employment discrimination disputes. In that fashion, employers will escape the extensive discovery so often needed to prove a discrimination case, *see Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), the public scrutiny of a court trial and the power of the court system to fashion wide-ranging remedies in order to eliminate past and future discrimination.

This Court, we submit, should not countenance such a reversal in this country's commitment to equal employment opportunity. The availability of a judicial forum for the resolution of employment discrimination disputes is, and always has been, essential to the enforcement of ADEA, Title VII and all other civil rights statutes. The Fourth Circuit's decision in *Gilmer* should be reversed and the continuing viability of *Gardner-Denver* and its progeny affirmed.

Respectfully submitted,

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